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The Proposed TTIP Tribunal and the Court of Justice: What Limits to Investor-State Dispute Settlement under EU Constitutional Law?

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Stephan Schill

29 September 2015

The recent release by the EU Commission of a draft investment chapter for the Transatlantic Trade and Investment Partnership (TTIP) that proposes the establishment of a permanent TTIP Tribunal constitutes an important step in the reform debates in international investment law. But it also raises salient, and so far little discussed, issues of EU constitutional law, in particular those that the Court of Justice has emphasized in Opinion 2/13 rejecting EU accession to the European Convention on Human Rights (ECHR). As I argued in a recent Editorial in *The Journal of World Investment and Trade*, Opinion 2/13 is not only relevant in the area of human rights, but also requires us to think hard about the EU constitutionality of the suggested TTIP Tribunal, or any other mechanism of investor-state dispute settlement (ISDS) under future EU international investment agreements (IIAs).

Constitutional Limits to EU Accession to the ECHR

Opinion 2/13 establishes a number of – explicitly constitutional (see Opinion 2/13, §§ 155-176) – challenges that EU accession to the ECHR poses. These are

- the need for international dispute settlement mechanisms to respect the primacy and autonomy of EU law and the exclusive competence of the CJEU to interpret and apply EU law (Article 19(1)(2) TEU) (§§ 179-200) by ensuring that an international court, such as the European Court of Human Rights (ECtHR) ‘must not have the effect of binding the EU and its institutions ... to a particular interpretation of the rules of EU law’ (§ 184);
- ensuring the CJEU’s exclusive jurisdiction under Article 344 TFEU by preventing disputes, as permitted by Article 33 ECHR, between Member States about compliance with the ECHR when implementing EU law (§§ 201-214);
- ensuring that an international court or tribunal does not rule, as the ECtHR could have under certain circumstances, on the distribution of responsibility for ECHR violations between the EU and its Member States and on the proper respondent in a proceeding, thereby contravening an exclusive competence of the CJEU (§§ 215-235);

- involving the CJEU concerning the implementation of EU law prior to the ECtHR's decision in order to determine not only the compatibility of EU law with the ECHR, but also to clarify the interpretation of secondary EU law that is subject to review in Strasbourg (Opinion 2/13, §§ 236-248); and
- respecting, in the context of the EU's Common Foreign and Security Policy (CFSP), a field where the CJEU only has limited competences, that 'judicial review of acts, actions or omissions on the part of the EU, including in the light of fundamental rights, cannot be conferred exclusively on an international court which is outside the institutional and judicial framework of the EU' (Opinion 2/13, § 256).

Implications of Opinion 2/13 for Investor-State Dispute Settlement

While Opinion 2/13 has not been widely discussed in the context of the EU's international investment policy, there are voices that see Opinion 2/13 as a major obstacle to ISDS under EU IIAs, including potentially in the form of a permanent TTIP Tribunal. In substance, however, Opinion 2/13 adds few, if any, additional constitutional provisos for ISDS under EU IIAs, be they mixed or EU-only. Instead, the Court's latest Opinion reiterates – and sharpens – concerns already expressed in Opinion 1/91 (Economic Area Agreement I), Opinion 1/00 (European Common Aviation Area), and Opinion 1/09 (European and Community Patents Court). Although there is a degree of speculation about how the CJEU, if confronted with the matter, would view ISDS, I see sufficient room for keeping such mechanisms as part of EU IIAs. Just as none of the earlier CJEU decisions, as I have argued elsewhere, constitute unsurmountable obstacles to ISDS under EU IIAs, is it possible, through careful ISDS design, to meet the CJEU's concern to protect the primacy and autonomy of EU law and the Court's exclusive competences. These questions, however, need to be put on the table and debated – more so than currently done by the Commission.

Two provisos of Opinion 2/13 are relatively easy to handle. First, Article 344 TFEU should not cause further concern as it only applies to disputes between EU Member States, not to those involving a private investor. Second, any dispute settlement mechanism under an EU IIA would need to make sure that it does not, directly or indirectly, review the distribution of competences between the EU and Member States, for example by making determinations about the proper respondent or the distribution of responsibility. Both these issues are addressed (internally) by the so-called Financial Responsibility Regulation and reflected, for example, in Article 5 of the TTIP draft, which binds the proposed TTIP Tribunal to EU internal determinations on these issues.

Separating International Investment Law and EU Law

The more difficult issues concern the CJEU's first, fourth, and fifth objection in Opinion 2/13. To respond to concern No. 1, it seems imperative to limit the jurisdiction of an ISDS mechanism to claims for breach of the applicable EU IIA, to the exclusion of breaches of EU

law. In addition, the ISDS mechanism must be prevented from indirectly ‘binding the EU and its institutions ... to a particular interpretation of ... EU law’ (Opinion 2/13, § 184). Two issues require consideration here: First, a particular interpretation of EU law could be necessary in light of the ISDS mechanism’s interpretation of investment treaty standards if the same, or essentially the same, standards also exist as norms of EU law and require identical interpretation. In the presence of such ‘multi-sourced equivalent norms’, a core concern in Opinion 1/91, the interpretation by the ISDS mechanism could *de facto* bind the CJEU to a specific interpretation of EU law. Yet, unlike in the human rights context where Convention rights and Charter rights are equivalent and linked through Article 53 ECHR and Article 53 CFR, EU IIA standards and EU law are two entirely independent bodies of law.

Second, EU institutions could be bound to a specific interpretation of EU law, if EU IIAs were integrated into EU law. Yet, at least with the Canada-EU Comprehensive Economic and Trade Agreement (CETA), this is not the case: Article 14.16 in Chapter 33 provides that CETA is not directly applicable within the EU order. In addition, remedies for breach of an EU IIA are regularly limited to compensation and damages, excluding specific performance (see Article 28(1) of the TTIP draft). Similar to the situation under WTO law, this would permit the continued application of EU law within the EU legal order contrary to an IIA at the cost of paying damages. Only where the legality of a monetary payment is at issue, for example the repayment of a subsidy granted contrary to EU law, is the payment of damages economically equivalent to specific performance. It is perhaps for this reason that Article 2(4) of the TTIP draft *de facto* excludes review of certain subsidies by a TTIP Tribunal. In any event, it is doubtful whether the narrow case of subsidies would infringe the primacy of EU law and the exclusive jurisdiction of the CJEU. After all, Member State law may also grant – under certain circumstances – monetary compensation if the implementation of EU law infringes constitutionally protected private rights (see BVerfG - Honeywell, §§ 66, 84-86).

Need for Prior Involvement of the CJEU?

The fourth issue in Opinion 2/13 involves the CJEU’s demand for prior involvement in the interpretation of EU law as a preliminary, or incidental, question. Yet, if the CJEU’s exclusive jurisdiction were to require that an ISDS mechanism could not decide such questions without submitting them to the CJEU first under a preliminary reference procedure, the EU’s participation in ISDS would become difficult. After all, were the CJEU to demand such a prerogative, the same would also need to be granted, as a matter of reciprocity, to the constitutional or supreme courts of the EU’s co-contracting parties. This would bring domestic courts back into ISDS, a result that IIAs usually want to avoid. If a preliminary reference procedure is needed, however, from the perspective of EU constitutional law, an issue the TTIP draft does not even allude to, creative treaty drafting would be required in order not to end up with a strict rule on the exhaustion of local remedies under EU IIAs.

There are, however, also important arguments against the need for a preliminary reference procedure for incidental questions of EU law. After all, it is questionable whether an ISDS mechanism would ever need to interpret EU law or determine the conformity of a norm of EU law with the applicable EU IIA. Instead, the ISDS mechanism would principally assess whether a concrete measure, by the EU or a Member State, that affected the claimant-investor was contrary, or not, to the applicable IIA, independently of whether that measure was mandated by EU law, in conformity with EU law, or in breach of it. Compliance or non-compliance with EU law, in other words, is irrelevant for determining whether a concrete measure was in conformity with an investment treaty provision. Only the distribution of responsibility between a Member State and the EU depends on the interpretation of EU law. This matter, however, would be left to the EU to decide, as the current TTIP draft emphasizes. It may therefore well be possible to do without prior involvement of the CJEU.

Judicial Review in Common Foreign and Security Policy

Finally, there is concern No. 5: the conferral of powers of judicial review in an area where the CJEU only has limited jurisdiction, namely CFSP matters. Such matters could also come under the scrutiny of an ISDS mechanism, such as a TTIP Tribunal, if they affect foreign investors. If the sweeping claim in Opinion 2/13 that ‘jurisdiction to carry out a judicial review of acts, actions or omissions on the part of the EU ... cannot be conferred exclusively on an international court which is outside the institutional and judicial framework of the EU’ (Opinion 2/13, § 256) is taken at face value, ISDS under EU IIAs in CFSP matters, including the proposed TTIP Tribunal, would be difficult to sustain. Whether the CJEU’s statement can, however, be transposed to ISDS is questionable. After all, the CJEU here relied on Opinion 1/09 that addressed the prospective Patents Court which would have had very distinctive features from ISDS, including a permanent investment court. The Patents Court would have applied EU law routinely and bypassed the otherwise competent domestic courts. An ISDS mechanism, by contrast, would be excluded from applying EU law anyways; it would also not prevent the application of domestic and EU law by domestic and EU courts. The proposed TTIP Tribunal, for example, would be limited to applying treaty standards (see Article 1(1) TTIP draft) that domestic courts may not even be able to apply if the treaty lacks, as under CETA, direct effect.

Allowing Europe to Contribute Shaping the International Investment Regime

In sum, the differences between human rights adjudication in Europe, on the one hand, and ISDS, including a TTIP Tribunal, on the other, prohibit drawing overly quick conclusions from the CJEU’s pronouncements in Opinion 2/13. This notwithstanding, the unknown stance of the CJEU on ISDS does not simplify the EU’s position in negotiating IIAs. On the contrary, it creates additional uncertainty for the EU’s treaty partners as to the possibility of the EU to commit to ISDS. To reduce this uncertainty it may be advisable to request the CJEU, through

an advisory opinion, to assess the compatibility of ISDS, such as the proposed TTIP Tribunal, with EU constitutional law. The [impending proceedings before the CJEU](#) concerning the EU-Singapore Free Trade Agreement could have been an opportunity to not only clarify the EU's competence in matters of foreign investment but also, more generally, the constitutional requirements for ISDS under EU law.

Certainly, such an approach would have involved political risks. Yet, the much needed clarity on the constitutional questions involved would have merited that risk. Moreover, as I have argued in this contribution, ISDS can be structured in a way that respects EU law and the role of the CJEU. Furthermore, it is important to remind the CJEU of the principle it pronounced, time and again, most recently in Opinion 2/13: that 'an international agreement providing for the creation of a court responsible for the interpretation of its provisions and whose decisions are binding on the institutions, including the Court of Justice, is not, in principle, incompatible with EU law' (Opinion 2/13, § 182). After all, only an EU that is empowered to participate actively in, and fully submits to binding international dispute settlement, is able to demand the same of other countries, and thereby is able to shape the future world order according to its values. This is, after all, what EU constitutional law, as laid down in Art. 21 TEU, requires of it.

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[Stephan Schill](#)

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